CLERK'S COPY.

CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 193

CHICAGO & NORTHWESTERN RAILWAY COMPANY, A CORPORATION,

vs.

O. N. LINDELL

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED JUNE 24, 1929

(34,324)

(34,324)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 193

CHICAGO & NORTHWESTERN RAILWAY COMPANY, A CORPORATION,

vs.

O. N. LINDELL

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Original	Print
Certificate from the United States circuit court of appeals for the ninth circuit	1	1
Question certified	1	1
Statement of case	2	2
Judges' signatures	3	3
Clerk's certificate (omitted in printing)	3	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 29, 1929

[fol. 1]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 5778

CHICAGO & NORTHWESTERN RAILWAY COMPANY, a Corporation, Appellant,

vs.

O. N. LINDELL, Appellee

Upon Appeal from the United States District Court for the Southern District of California, Northern Division

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit under Section 239 of the Judicial Code

For the proper decision of the above entitled cause pending on appeal and duly submitted for consideration, instructions are respectfully requested of the Supreme Court on the following important, if not controlling, question of law, concerning which we are in doubt:

QUESTION CERTIFIED

Question. Where an interstate railroad carrier delivers to the consignee at destination a consignment of freight without collecting the transportation and other lawful [fol. 2] charges and thereafter brings an action at law to recover from the shipper the amount thereof, in a United States court in a district where the state law provides that if a defendant omits to set up a counterclaim arising out of the transaction constituting the foundation of the plaintiff's claim he cannot thereafter maintain an action upon the same, and, further, that where such cross-claims have existed "the two demands shall be deemed compensated," is the shipper, acting in good faith and without collusion, debarred by the Interstate Commerce Acts, particularly the Hepburn Act (34 Stat. 587) from pleading, by way of setoff, a counterclaim for a loss suffered by him as a result of the carrier's failure to perform its obligations touching the transportation and delivery of the identical shipment?

The question arises in this way:

From the pleadings and the stipulation of facts it appears that on October 17, 1925, appellee delivered to the Southern Pacific (railroad) Company at Kingsburg, California, a shipment of grapes to be transported to Chicago and there delivered to a designated consignee. Without the collection of the freight and other proper charges aggregating $683.79, from either the shipper or the consignee, the consignment was so carried and delivered, the service from Omaha to destination being rendered by the appellant company. Because of unreasonable delay on the part of appellant in moving the grapes and its failure to use reasonable care in keeping them properly iced, they were delivered in a damaged condition, to appellee's loss in an amount equal to or in excess of $683.79. No part of either the claim for freight or the claim for damages having been paid, appellant, on May 7, 1928, commenced this action in the United [fol. 3] States District Court for the Southern District of California to recover the amount of the freight charges, and, answering, the shipper, besides denying certain of the averments of the complaint, affirmatively set up as a defense his loss from failure to ice and to transport with reasonable dispatch, which he claimed to be $1,011.70. He asked for no affirmative relief but only that the amount be held to be a setoff in satisfaction of appellant's claim. The court below entertained and allowed such setoff, and the plaintiff appeals.

Where, under facts generally analogous, the precise question has been considered the decisions are apparently in irreconcilable conflict. The following would seem to answer it in the affirmative: I. C. R. Co. v. Hoopes, 233 Fed. 135; C. & N. W. Ry. Co. v. Stein, 233 Fed. 716; Johnson-Brown Co. v. Railroad, 239 Fed. 590; Penn. R. Co. v. South Carolina, etc., 25 Fed. (2d) 315; D., L. & W. R. v. Nuhs Co., 93 N. J. Law 309, 111 Atl. 223; Adams Express Co. v. Albright Bros., 75 Pa. Super. Ct. 410.

And the following, in the negative: Wells Fargo & Co. v. Cuneo, 241 Fed. 727; C. & N. W. Ry. Co. v. Tecktonius Mfg. Co., 262 Fed. 715; Payne v. Clarke, 271 Fed. 525; C. M. & St. P. Ry. Co. v. Pioneer Grain Corp., 26 Fed (2d) 90;

Battle v. Atkinson, 9 Ga. App. 488, 71 S. E. 775; Central, etc., v. Birmingham, etc., Ala. App. 419, 64 So. 202; Nashville, etc., v. Tennessee Mill Co., 143 Tenn. 237, 227 S. W. 443; Penn. R. Co. v. Bellinger, 101 Misc. Rep. 105, 166 N. Y. S. 652; N. Y. Cent. R. Co. v. Federal Sugar, etc., 201 App. Div. 467, 194 N. Y. S. 467.

Dated June 13, 1929.

Frank H. Rudkin, Frank S. Dietrich, Curtis D. Wilbur, Circuit Judges, Ninth Circuit.

Clerk's certificate to foregoing paper omitted in printing.

Endorsed on cover: File No. 34,324. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 193. Chicago & Northwestern Railway Company, a corporation, vs. O. N. Lindell. (Certificate.) Filed June 24th, 1929. File No. 34,324.